No. 12782.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

Although replete with reference to matters extraneous to the basis of the jurisdiction of the District Court and this Court, Appellant's "Preliminary Jurisdictional Statement" covering pages 1 to 6, inclusive, of Appellant's Opening Brief, fails to include transcript reference to the pleadings in this proceeding which would reveal that prior to the hearing on review by the District Court (1) the Chapter XI proceedings terminated, (2) the debtor was adjudicated a bankrupt, and (3) E. A. Lynch qualified as trustee in bankruptcy of the said Arlie R. Lockwood as a bankrupt.

Obviously the failure of Appellant to bring up to this court a sufficient transcript covering essential jurisdictional elements is a matter of concern to the Appellant and not to the Appellee.

The very title of this case on appeal (a matter also solely in the control of Appellant) fails to reveal that E. A. Lynch as trustee in bankruptcy of Arlie R. Lockwood, Bankrupt, is the appellee herein. Notice of appeal in this case was served upon counsel for E. A. Lynch as trustee in bankruptcy, although the transcript merely refers to an affidavit of service by mail attached to the notice of appeal, without indicating when and upon whom such service was effected. [Tr. p. 86.] The undertaking for costs on appeal filed by Appellants is expressly for the benefit of E. A. Lynch, trustee in bankruptcy for Arlie R. Lockwood, the Appellee herein. [Tr. pp. 86 to 89.] We are uncertain whether the *Comptroller* of the State of California referred to in said undertaking is one and the same party as the *Controller* of the State of California who filed the notice of appeal herein.

II.

Specification of Errors.

Appellant has chosen to ignore Rule 20(d) of the Rules of this court which requires an appellant's opening brief on appeal to include a *"specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged."* Failure of Appellant to comply with the rule, particularly with respect to the requirement of Rule 20(d) that appellant in such specifications particularly state *wherein* the findings of fact and conclusions of law are alleged to be erroneous, places an unnecessarily difficult burden upon Appellee herein in determining the true nature of Appellant's alleged grievances.

It appears from *Peck et al. v. Shell Oil Co., Inc.,* 142 F. 2d 141, at page 143, that this court has held that a mere reference in the brief to a page in the printed transcript where appellant's statement of points on appeal appears is not sufficient to satisfy Rule 20(d). On page 6 of his brief, Appellant, by way of his "Preliminary Jurisdictional Statement," refers to the filing of a "Statement of Points Upon Which Appellant Intends to Rely" [which statement is indicated as appearing at pages 323 to 325 of the transcript]. The statement of points referred to alleges the findings and conclusions of the District Judge to be error, but fails, as required by Rule 20(d) to "state as *particularly* as may be *wherein* the findings of fact and conclusions of law are alleged to be erroneous."

This court, in the case of *Simons v. Davidson Brick Co.,* 106 F. 2d 518, at page 521, declared:

> "Our rule should be followed. It is necessary as far as possible to sharply define the contentions of the ap-

pellant, and to avoid the difficulties arising from haphazard contentions upon questions of law and fact that may or may not be germane to the questions raised on appeal."

That no special immunity respecting compliance with court rules exists in favor of a governmental body is evident from the fact that this court in the cases of *United States v. Shingle,* 91 F. 2d 85 and *United States v. John II Estate,* 91 F. 2d 93, disregarded assigned errors not specified in the brief of the appellant *United States of America.*

A statement of points relied on which is violative of court rules presents no question for review by the court of appeals.

Butler v. U. S. (C. C. A. 8), 108 F. 2d 27;
Cohen v. U. S. (C. C. A. 4), 142 F. 2d 861;
Mathewson v. First Trust Co. (C. C. A. 8), 100 F. 2d 121;
Lohman v. Stockyards Co. (C. C. A. 8), 243 Fed. 517;
City of Goldfield v. Roger (C. C. A. 8), 249 Fed. 39.

III.

Statement of the Case.

Appellant's "Statement of the Case" consumes 16 pages of Appellant's brief, to-wit: pages 7 to 23, inclusive, and consists of an argumentative and self-serving narration of the evidence. By no stretch of the imagination however, can Appellant's "Statement of the Case" be deemed to constitute a compliance with Rule 20(c) of this court which calls for "a *concise* abstract or statement of the case presenting *succinctly* the *questions involved* and the manner in which they are raised."

IV.
Questions on Appeal.

The absence from Appellant's brief of both the specification of errors and a statement of the questions involved, confronts Appellee with the alternative, either to ignore completely the unspecified arguments contained in Appellant's brief, or to "search" such brief and engage in argument which may become surplusage if this court refuses to consider the arguments as to unspecified error.

Cyc. Fed. Proc. (2nd Ed.), Volume 12, Section 6046, page 21:

> "If there are any errors assigned and argued, which are not presented, or not sufficiently presented, for review upon the record, appellee should in his brief call attention to the fact and urge that they are not open for consideration. Appellee cannot go beyond supporting the decree or judgment and opposing the assignments of error."

Although it may be superfluous to do so, we have analyzed the arguments contained in Appellant's brief, and believe that the questions attempted to be raised by Appellant may be defined as follows:

1. Where, by state statute, a tax is imposed upon the distribution of motor vehicle fuel (such tax being imposed upon one distribution only irrespective of the number of transactions involving such fuel), was it error for the District Court to hold that the Controller of the State of California had failed by his proof to sustain a tax lien claim over the objections of the bankrupt (then a

Chapter XI debtor) and his receiver, the evidence disclosing merely that the bankrupt, a licensed broker under the California Motor Vehicle Fuel License Tax Act, was in possession of invoices indicating sales of gasoline in excess of the monthly sales reported by him to the Board of Equalization, and that such bankrupt had purchased all gasoline handled by him from licensed distributors who had previously paid the motor vehicle fuel tax upon the initial distribution of such gasoline?

2. Was the District Court bound by the referee's finding of alleged fact that the bankrupt had "distributed" a specified volume of gasoline, such finding actually constituting a conclusion of law supported only by evidence of unreported sales not linked to tax unpaid gasoline?

3. Does the rule in tax refund and similar causes which places the burden of proof upon the taxpayer apply to proceedings in bankruptcy wherein a receiver or trustee in bankruptcy has filed objections to the claim of a tax creditor seeking to establish a lien priority?

4. Where a petition for review to the District Court from an order of the referee overruling objections to a creditor's claim is filed by a debtor in possession in Chapter XI proceedings, and where during the pendency of such review, the Chapter XI proceedings are dismissed and the debtor is adjudicated a bankrupt, does the trustee in bankruptcy for such bankrupt succeed to the rights of the debtor in the then pending review proceedings?

V.

Pertinent Provisions of the California Motor Vehicle Fuel License Tax Law.

Under the foregoing heading, Appellant has printed at length various sections of the *Revenue and Taxation Code* of the State of California. (App. Op. Br. pp. 24-35, incl.) Unfortunately, Appellant has given little regard to the dates of enactment or amendment of the statutory sections appearing in Appellant's brief, many of such sections and amendments thereto *not even having been enacted until after the critical dates involved in this appeal, to-wit:* The months of January, May, June, July and September of 1945, and the months of April and May of 1946. [Tr. p. 28.]

Section 7351 of the *Revenue and Taxation Code* as it appears on page 24 of Appellant's brief had been amended June 23, 1947, the amendment not becoming operative until July 1, 1947. (Stats. Ex. Sess. 1947, Ch. 11, Sec. 29.) As it read prior to its amendment it made no reference to a rate of $0.04½ per gallon.

Sections 7303, 7493, 7700, 7729, 7730, 8251, 8252, and 8253 of the *Revenue and Taxation Code* quoted by Appellant appear to have no pertinency to any of the issues on this appeal.

Subdivision (e) of Section 7305 appearing on page 25 of Appellant's brief was added by the Statutes of 1948, Chapter 36, Section 1, and did not become effective until April 29, 1948.

Section 7353 on page 27 of Appellant's brief represents an amendment adopted by Statutes 1945, Chapter 531, Section 2, which amendment was not operative until July 1, 1945. The amendment substituted the word "determination" for the word "assessment."

Section 7401 as printed by Appellant on pages 27 and 28 of Appellant's brief incorporates amendments adopted by Statutes 1945, Chapter 531, Section 3; Statutes Extraordinary Session 1947, Chapter 15, Section 1; and Statutes 1949, Chapter 711, Section 1. These amendments became effective on July 1, 1945, July 10, 1947, and June 18, 1949, respectively. Since the section lacks relevancy to the issues herein, we do not undertake to point out the effect of the amendments.

The second paragraph of Section 7726 was not enacted until 1947. (Stats. 1947, Ch. 1564, Sec. 1.)

While we would refuse to believe that Appellant was guilty of intentional misrepresentation of the foregoing statutory provisions, we believe that the carelessness displayed is characteristic of Appellant's entire brief.

ARGUMENT.

I.

The Findings of the Referee Are Not Supported by the Record and Were Properly Set Aside by the District Court.

The critical finding of the referee consists of his finding No. IX to the effect that during certain designated months in 1945 and 1946 the bankrupt had *"distributed"* a specified volume of motor vehicle fuel upon which the 3¢ per gallon tax had not been paid to the State of California. [Tr. pp. 59, 60.]

Upon the same evidence, the District Court found that certain sales invoices discovered among the records of the bankrupt indicate sales of gasoline in the amount specified in the referee's finding No. IX, but that there was an absence of evidence that the motor vehicle fuel sold by the bankrupt during such periods of time was not purchased from licensed manufacturers or distributors who had already paid the motor vehicle fuel tax on such fuel. [Tr. pp. 82-83.] Whether "distribution" within the meaning of *Revenue and Taxation Code, Section 7305,* had taken place represents a conclusion of *law* that could be reached only upon findings of fact that one or more of the several acts constituting "distribution" within the meaning of the statute had been committed by the bankrupt. The referee did not, and could not under the evidence find that the bankrupt had *refined, manufactured, produced, blended,* or *compounded* motor vehicle fuel other than 792 gallons of kerosene blended with gasoline by mistake. [Tr. p. 83.]

In the absence of such findings, the conclusion that "distribution" had taken place could not be drawn from the evidence before the court.

Nor is there any evidence in the record which can support that portion of referee's finding No. IX in which the referee finds that the motor vehicle fuel so "distributed" was fuel with respect to which the motor vehicle fuel tax had not been paid to the State of California.

The bankrupt affirmatively testified that at no time during 1945 and 1946 did he purchase any gasoline from a concern not licensed as a distributor in the State of California. [Tr. p. 236.] He specifically testified to the names of the concerns from which he purchased such gasoline. [Tr. pp. 236-237.] He testified that the gasoline sold by him during the calendar years 1945 and 1946 was all tax-paid gasoline. [Tr. p. 238.] He also testified that the price which he paid for gasoline included a 3¢ state tax and a 1½¢ federal tax. [Tr. p. 239.]

The foregoing evidence stands uncontradicted. In fact, it is *convincingly corroborated by evidence introduced by Appellant.* The Supervising Auditor of the Board of Equalization testified that despite intensive investigation, the Board *was unable to find a single instance in which the bankrupt had received gasoline upon which the tax had not been paid.* [Tr. pp. 187 and 188.]

It is clear that Appellant's case required proof of the sale of gasoline upon which a tax had previously not been paid, and mere evidence of sales of gasoline without attributing them to a source other than a licensed distribu-

tor omits the most essential link in the chain of proof which would classify such gasoline as being subject to the motor vehicle fuel tax.

Appellant refers in his brief to the fact that the bankrupt did not deny being involved in black market operations. The hearing on Appellant's claim did not constitute a prosecution against the bankrupt for black market operations, nor has Appellant established that, if proved to have been engaged in black market operations, a motor vehicle fuel tax would have been incurred by the bankrupt. The explanation which the bankrupt gave to six auditors and investigators of the Board of Equalization was that he was, in his own opinion, the leading black market operator of gasoline in southern California. [Tr. pp. 228-230.] The bankrupt's very explanation belied the taxability sought to be established by Appellant. When the bankrupt made his explanation to the representatives of the Board of Equalization, he had in his possession approximately $30,000.00 worth of illegally procured O.P.A. ration books, ration stamps, and ration coupons, which he stated had become worthless as a result of the end of the war with Japan. He explained that he was engaged in the business of selling gasoline to service stations without coupons, and that he used the illegal coupons and ration checks as the means of covering such transactions. His procedure was to execute false sales invoices in order to justify his possession of the coupons and ration checks. [Tr. p. 229.] Reprehensible as this conduct may be, it may have been occasion for proper action by United

States officials for the violation of the law, but is no occasion for unjust enrichment to the State of California by way of motor vehicle fuel taxes which had not been incurred.

Appellant, faced with the evidence that the gasoline handled by the bankrupt was all tax paid gasoline, introduced testimony concerning four possible sources from which tax unpaid gasoline could have been procured during World War II. [Tr. pp. 226-228.] There was no evidence introduced linking the bankrupt to any one of the four such sources. In order to reach the conclusion which was reached by the referee, it is necessary to indulge in the speculation and conjecture that the bankrupt had engaged in one or more of the illicit operations which were suggested by the testimony of Appellant's witness. In his memorandum opinion, the District Judge cited several cases which support the hornbook principle that a finding of fact cannot be predicated upon guesswork, surmise or conjecture. [Tr. pp. 77-79.]

Were we confronted by an absence of any evidence at all on the subject matter, it would be presumed that the law had been complied with by the usual and customary payment of the fuel tax by the refiner rather than violated by the failure of the refiner to pay the same. The referee's finding not only lacks any support in the record, but it is contradicted by the only evidence upon the subject, including the evidence introduced by the tax claimant.

II.

The District Court Was Not Bound by the Conclusions of Law of the Referee or by the Referee's Unsupported Findings of Fact.

We borrow a quotation found on page 40 of Appellant's opening brief taken from the case of *In re Alberti,* 41 Fed. Supp. 380, 381, save only that we place the emphasis where we believe it properly belongs, to-wit:

> "This means that, while, on conflicting testimony, we must follow the findings of the referee (or the commissioner) *when there is no conflict of testimony, or when the testimony upon which the decision is based is not legally entitled to the effect which the commissioner has given to it, there is no evidence whatsoever* to sustain the commissioner." (Emphasis ours.)

When the findings of the referee in bankruptcy are based solely upon an inference, drawn from uncontradicted facts, the reasonableness of the inference may be as fairly determined by the court as by the referee, and no presumption in favor of the referee's findings exists which binds the independent judgment of the court.

> *Stewart v. Ganey* (C. C. A. 5), 116 F. 2d 1010;
>
> *O'Brien-Manuel Federal Appellate Procedure* (3rd Ed.), p. 122.

In the instant case the referee actually rendered no findings of fact upon the subject matter of "distribution." To have done so would have required the receipt of evidence and determinations of fact covering acts sufficient to constitute distribution within the definition of Section *7305* of the *Revenue and Taxation Code.* Appellant's argument that the District Court was bound by the referee's findings of fact is irrelevant inasmuch as the ref-

eree's crucial finding in this case was merely an unsupported conclusion of law clothed in the formal robe of a finding of fact.

Where a referee's purported findings of fact are in effect conclusions of law, the District Court need not accept them on review.

> *Bank of America v. Lerer* (C. C. A. 9), 77 F. 2d 758.

III.

The Burden of Proof to Support Its Tax Lien Claim Rested Upon the Claimant.

Appellant seeks to escape the effect of the inadequacy of the record to support his case by urging application of a rule appropriate to tax refund and similar cases which fixes the burden upon the taxpayer to establish that a tax assessment (even though arbitrary) is not due and owing under the taxing statute.

Section 57n of the *Bankruptcy Act* provides that all claims including those of the United States or of any state are provable in the manner provided by such section.

Government claims for taxes arising prior to bankruptcy are on a footing of equality with all other provable debts, as far as the manner and time of proof is concerned.

> *Collier on Bankruptcy* (14th Ed.), Vol. 3, Sec. 63.26, p. 1869.

While a state may provide procedural rules affording special treatment for determination of state taxes in the state courts, such as Sections 7730 and 7981 of the *Revenue and Taxation Code,* rules of procedure applicable to suits in a state court do not and should not affect the

established procedure of a court of bankruptcy in the determination of creditors entitled to participation in a bankruptcy estate.

> *American Surety Co. of N. Y. v. Sampsell* (C. C. A. 9), 148 F. 2d 986, 987.

Although federal district courts under the *Conformity Act* are required to adapt their procedure to the practice existing in the state courts where the district court is held, the *Conformity Act* does not apply to bankruptcy procedure.

In the case of *In re Paleais,* 296 Fed. 403, 406 (cert. den. 264 U. S. 591, 68 L. Ed. 865, 44 S. Ct. 404), the Second Circuit said:

> "The claim put forward is based on section 914 of the Revised Statutes otherwise known as the Conformity Act [Comp. St. No. 1537], which reads as follows: 'The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the * * * District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such * * * District Courts are held, any rule of court to the contrary notwithstanding.'
>
> "But that statute very clearly has no application to the practice, pleadings, forms, and modes of proceeding in bankruptcy. The statute expressly declares that it applies 'in civil causes, other than equity and admiralty causes.' And bankruptcy proceedings are purely equitable in character, and within the limits of the Bankruptcy Act [Comp. St. Nos. 9585-9656], and the special rules of practice prescribed by the Supreme

> Court of the United States, are administered in accordance with the principles and practice of equity. They are not, therefore, subject to the Conformity Act."

See, also, *Remington on Bankruptcy* (5th Ed., 1950), Volume 1, Sec. 32, at page 67, to the effect that:

> "A further cogent reason why bankruptcy proceedings never have been required to conform to practice of the state wherein the court sits is to be found in the interstate and specialized character of such proceedings, long recognized as requiring uniformity in practice and procedure throughout the nation."

A court of bankruptcy is a court of equity. Its function is to supervise and control the fair and equitable administration of an estate in bankruptcy, even where in the exercise of such power it is compelled to ignore a duly enforceable judgment of a state court.

> *Pepper v. Litton,* 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281.

In the case of a general unsecured claim which is verified and which sets forth all of the facts necessary to establish and pass upon the validity of such claim, the claim is said to have *prima facie* validity, and the burden is upon the objecting party to introduce evidence to rebut the *prima facie* case established by the claim. Once this has been accomplished, the burden passes entirely to the claimant to sustain his claim.

> *Alexander v. Theleman,* 69 F. 2d 610, 611 (C. C. A. 10);
>
> *In re Youroveta Home etc. Co.,* 297 Fed. 723 (C. C. A. 2).

The claim of the State of California in this case however, was not entitled even to the *prima facie* validity usually afforded an ordinary claim in bankruptcy. In the first place, both the claim and amended claim of the Appellant herein are based upon *information and belief.* [Tr. pp. 20, 26.] The reason for affording evidentiary effect to a properly sworn proof of claim is that the proof of claim is in the nature of a deposition, and therefore has evidentiary effect. In fact, former *General Order* XXI referred to a proof of claim as a "deposition to prove claims."

In re United Wireless Telegraph Co., 201 Fed. 445;

In re Century Silk Mills, 296 Fed. 713.

An affidavit or a deposition which is based upon information and belief is the same as no affidavit or deposition at all.

Bank of America v. Williams, 89 Cal. App. 2d 21, 200 P. 2d 151;

Riviello v. Journeyman Barbers, etc., 88 Cal. App. 2d 499, 199 P. 2d 400;

Gay v. Torrance, 145 Cal. 144, 78 Pac. 540;

In re United Wireless Telegraph Co., 201 Fed. 445, 448.

Where the proof of claim is insufficient, the claim may be disallowed, or the referee may order proper and legitimate inquiry into the fairness and legality of the claim. It was appropriate therefor, that the referee under these circumstances, fix the burden of proof upon the claimant.

Orr v. Park (C. C. A. 5), 183 Fed. 683.

Even had the claim been properly filed, the fact that it sought *priority* allowance, and, the establishment of a *lien,* deprived the claimant of the benefits of a *prima facie* case from the mere proof of claim, such treatment not being afforded to priority claims.

> *Weekley v. Oil Well Supply Co.* (C. C. A. 4), 12 F. 2d 539;
>
> *Bolling v. Bowen* (C. C. A. 4), 118 F. 2d 59;
>
> *Collier on Bankruptcy* (14th Ed.), Vol. 3, Sec. 57.18, p. 233.

Appellant correctly ascribes the rationale behind placing the burden upon the taxpayer to overthrow the tax assessment in the tax refund type of case as being the intimate acquaintanceship of the taxpayer with the facts. It is appropriate that the taxpayer be estopped by his conduct if he fails to satisfactorily explain any discrepancy in his books.

The estoppel however would not apply to a receiver or bankruptcy trustee who stands in the shoes of third parties, the creditors of the estate.

Thus the Court of Appeals for the Sixth Circuit in the case of *In re Gustav Shaeffer Co.,* 103 F. 2d 237 at page 241, said:

> "This provision is found in the act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebutable presumption of the validity and correctness of the assessment made by the taxing

authorities. The language of the statute is plain and it is the duty of the court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to local taxing statutes.

* * * * * * * *

"There was no priority between the trustee and the bankrupt. The former acquired title to the property by operation of law *and the doctrine of estoppel is inapplicable.*

"Under Section 70a, 11 U. S. C. A. #110(a), the trustee acquires the title of the bankrupt to all of his property and possessions at the date the petition is filed, subject to valid claims, liens and equities enforceable against the bankrupt. Under Section 47a, as amended, 11 U. S. C. A. #75(a), in determining conflict of title between the trustee and third parties, his rights are to be determined as if he were a creditor holding a lien by legal or equitable proceedings at the time the petition was filed. *The trustee represents the general creditors and in this capacity may assert claims, avoid preferences and collect assets where the bankrupt, if bankruptcy had not intervened, would be estopped. In re Kessler,* 2 Cir., 186 F. 127; *Merchants' Nat. Bank v. Sexton,* 228 U. S. 634, 645, 33 S. Ct. 725, 57 L. Ed. 998." (Emphasis supplied.)

IV.

The Dismissal of Chapter XI Proceedings and Subsequent Adjudication of the Debtor as a Bankrupt Vests the Trustee in Bankruptcy With All of the Title and Rights of the Debtor in Proceedings Then Pending on Review.

Appellant in effect contends that the petition for review of the referee's order allowing Appellant's claim *expired with the adjudication of the debtor as a bankrupt,* and that the review initiated by the debtor could not thereafter be prosecuted by the debtor's trustee in bankruptcy. It is true, as Appellant states, that the referee refused permission to the *receiver* to petition for review from the referee's order allowing Appellant's claim. By such action the referee acted as his own appellate court. No review or appeal was taken from that particular order because its effect was not disastrous, the debtor as such having initiated the review. The receiver was permitted by the District Court to appear *amicus curiae,* as it was essential that the receiver, as the representative of the creditors, be permitted to be heard with respect to the allowance of the claim. Thereafter, and during the pendency of such review proceedings before the District Court, the debtor was adjudicated a bankrupt. Unfortunately the transcript designated by Appellant fails to cover these material proceedings. From the moment of adjudication, the debtor legally ceased to exist, and in his place and stead stood the trustee in bankruptcy of the bankrupt with all of the title of the bankrupt (previously debtor) as provided by *Section 70a* of the *Bankruptcy Act.* To now hold that the trustee could not carry on with the review proceedings would have the effect of ignoring succession of title under Section 70a, and would

be equivalent to abandoning the interests of creditors in the controversy pending on review.

If Appellant's position had any merit at all, the most that could be said for it would be, that, upon termination of the Chapter XI proceedings, and the advent of bankruptcy, the entire proceedings could have been begun anew with the filing of new objections by the trustee. This would have involved the unnecessary expense and inconvenience of retrying issues that had already been tried, and would have meant that the many days spent in the trial of this case would have been wasted. Results such as these are obnoxious to the objectives of bankruptcy and equity which aim at celerity, economy and conclusiveness.

> *Remington on Bankruptcy* (5th Ed.), Vol. 1, Sec. 27, p. 57.

A comparable situation arose in the case of *Canton Wire and Steel Co.,* 197 Fed. 767, wherein creditors had conducted litigation in their own name, establishing that a certain claim should be disallowed. The District Court, upon review, held that because a trustee in bankruptcy was subsequently appointed, the court should not ignore all that had gone before and compel the trustee to proceed anew with the litigation.

Where a claim is objectionable, it is not even necessary that formal objections be filed to such claim. It has been held that a referee must *sua sponte* raise the objection to the claim when the defect is called to his attention.

> *In re Strotz* (D. C., Cal.), 50 Fed. Supp. 322, 325;
> *Matter of Owl Drug Co.* (C. C. A. 9), 84 F. 2d 342.

The cases cited by Appellant to the effect that a party expecting to benefit from a review taken by another cannot be substituted for the petitioner and permitted to prosecute the review when the latter has abandoned or wishes to abandon it, has no relevancy to the problem before this court. There has been no abandonment or desire to abandon the proceedings on review. Termination of the debtor proceedings and the adjudication of the debtor as a bankrupt had the effect of substituting the trustee in bankruptcy in the place and stead of the debtor for purposes of such review.

Conclusion.

It is of little consequence to a trustee in bankruptcy that one claimant properly becomes entitled to preference over other creditors of a bankruptcy estate. It is his vital concern, however, that no claimant be permitted unjust enrichment at the expense of other claimants. The bankruptcy court, and a trustee as its agent, must vigilantly guard against inequity in the distribution of the estate. To this end it is the trustee's duty to object to the allowance of an insufficiently proved or unmeritorious claim, and to use every effort to avoid unjust enrichment to such creditor even if the creditor be the State of California or the United States of America.

In this case the trustee in bankruptcy succeeded to the prosecution of claim objections filed by the receiver of the debtor and the debtor in a Chapter XI proceeding. He here seeks the affirmance of the District Court's decision which disallowed a jeopardy or arbitrary assessment of motor vehicle fuel taxes because of the lack of evidentiary support to such claim, to-wit: that the bankrupt had distributed gasoline upon which the vehicle fuel

tax had not previously been paid by the refiner of such gasoline.

This is effectually a proceeding between one creditor and the representative of all other creditors. While conceivably as between the taxpayer and the taxing authority, the failure of the taxpayer to satisfactorily explain discrepancies in his books might serve to subject him to a tax which he doesn't lawfully owe, it would be abhorrent to equitable conscience that in a bankruptcy proceeding the taxing authority thus be unjustly enriched at the expense of other creditors, particularly where the trustee is not possessed of the "knowledge" of the bankrupt taxpayer as to the transactions involved. In this case, not only did the State not prove that the tax had been incurred, but the evidence shows that it is inherently improbable that any gasoline was sold upon which the refiner had not already paid the tax. The State would have us resort to the conjecture that this gasoline came from one of four principal sources where such tax unpaid gasoline might have been available. We respectfully submit that the District Court properly refused to sustain the claim on mere conjecture and surmise.

Respectfully submitted,

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